UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NATIONAL LABOR RELATIONS BOARD,

Applicant

v. Case No. 16-CV-622-GKF-PJC

INTERNATIONAL UNION OF OPERATING ENGINEEERS, LOCAL 627,

Respondent

REPLY OF THE NATIONAL LABOR RELATIONS BOARD TO RESPONDENT'S RESPONSE TO THE BOARD'S APPLICATION FOR AN ORDER REQUIRING COMPLIANCE WITH INVESTIGATIVE SUBPOENA

In further support of its Application for an Order Requiring Compliance with Investigative Subpoena ("Application"), the National Labor Relations Board (the "Board") hereby submits its Reply to the Response to the Application of Applicant ("Response") filed by International Union of Operating Engineers, Local 627 (the "Respondent").

A. A CERTIFIED RECORD IS NOT REQUIRED

As the Board showed in its memorandum supporting the Application, subpoena enforcement proceedings, as authorized by Section 11(2) of the Act, are summary in nature and are not subject to the same procedural formalities as typical civil actions. (Mem. in Supp. of Appl., Doc. 1-1, at 3-4). Nonetheless, Respondent objects here to the lack of a certified record, citing—without any explanation—the Federal Rules of Evidence and two state court cases having nothing to do with subpoena enforcement. (Resp. to Appl., Doc. 7, at 1-2). This objection has no merit. Under the National Labor Relations Act ("NLRA" or "the Act"), the Board must file a certified record only when its final orders fixing unfair labor practice liability or compliance obligations are reviewed in the first instance by a United States Court of Appeals. *See* 29 U.S.C. § 160(e), (f). Respondent cannot cite a single case or statutory provision requiring

the Board to file a certified record when it applies to a district court for subpoena enforcement. *See* 28 U.S.C. § 2112(d) (exempting from certified record requirements any "proceedings to review or enforce those orders of administrative agencies, boards, or commissions, or officers which are by law reviewable or enforceable by the district courts").

B. THE BOARD'S SUBPOENA WAS VALIDLY SERVED UPON RESPONDENT

Section 11(4) of the NLRA, 29 U.S.C. § 161(4), and Section 102.113(c) of the Board's Rules and Regulations, 29 C.F.R. § 102.113(c), state that a subpoena may be served "by leaving a copy thereof at the principal office or place of business of the person required to be served." The Board has held that use of a courier company satisfies this method of service. *In re Offshore Mariners United*, 338 NLRB 745, 745 (2002) (accepting the General Counsel's use of Federal Express to serve a subpoena).

Respondent argues that the Board has not effectuated proper service of the subpoena in this case. (Resp. at 4-5). However, the subpoena was successfully delivered by the United Parcel Service ("UPS") to the address provided by Respondent as its principal place of business. (Exhibit K). This fully satisfied the NLRA and the Board's Rules and Regulations, as interpreted by Board precedent. In its contention that there was no proper service of the subpoena, Respondent relies only upon cases where subpoenas were issued pursuant to Federal Rule of Civil Procedure 45, rather than Section 11 of the Act. (Resp. at 4-5). Because Section 11 allows service of a subpoena by use of a courier company like UPS, Respondent's challenge necessarily fails.

C. INTERROGATORIES MAY BE PROPOUNDED IN INVESTIGATORY SUBPOENAS

The Board's subpoena authority under Section 11 includes the power to require responses to written questions. *See EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 306, 313 (7th Cir.

1981); *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 478-79 (4th Cir. 1986); *NLRB v. Alaska Pulp Corp.*, No. 95-042, 1995 WL 389722, at *5 (D.D.C. May 25, 1995) (holding that Section 11(1) "does not exclude the use of interrogatories to obtain evidence"). In light of this precedent, Respondent's contentions to the contrary must fail. *See Alaska Pulp*, 1995 WL 389722, at *5 n.7 (finding no merit to employer's argument that 29 C.F.R. § 102.30, upon which Respondent relies, prohibited use of interrogatories as way of obtaining evidence under Section 11).[1]

Respondent additionally argues that Federal Rule of Civil Procedure 45(c) prevents the Board from requiring Respondent to produce documents beyond 100 miles of where they are kept. (Resp. at 6). Again, Respondent turns to the wrong source of law. Pursuant to Section 11 of the Act, which governs here, the Board may require production of evidence from "any place in the United States or any Territory or possession thereof." 29 U.S.C. § 161(1). The geographic strictures of Federal Rule of Civil Procedure 45 are wholly irrelevant to administrative subpoenas issued by the Board.[2]

D. THE SUBPOENA IS SPECIFIC AND IS NOT UNDULY BURDENSOME

Subpoenas issued by the Board are subject to limited judicial review. "The only limitation upon the power of the [NLRB] to compel the production of documentary or oral evidence is that it must relate to or touch upon the matter under investigation or in question." *Cudahy Packing Co. v. NLRB*, 117 F.2d 692, 694 (10th Cir. 1941).

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[1] Respondent's claim that a subpoenaed party need only comply if there is a "designated place of hearing" under Section 11(1) – which Respondent misattributes to Section 102.31 of the Board's Rules and Regulations – is essentially an indirect attack on the Board's ability to issue investigative subpoenas. (Resp. at 6). A legion of cases, including *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1007-08 (9th Cir. 1996), have rejected this line of argument.

[2] Moreover, Respondent ignores item 12 in the Instructions and Definitions section of the subpoena, which allows the Respondent to comply by mail or email.

Respondent does not argue that the evidence subpoenaed does not relate to or touch matter under investigation. Rather, Respondent makes a cursory claim that the subpoena's request for documents is not "specific." (Resp. at 5). This skeletal claim is belied by the subpoena itself. Paragraph 1 of the subpoena merely requests records substantiating Respondent's assertion of compliance with the Judgment. (Exhibit J at 3). Similarly, Paragraph 2 of the subpoena requests Respondent's records as necessary to compute the appropriate backpay owed to Stacy Loerwald. *Id*. Finally, the interrogatories ask Respondent to explain exactly when and how they complied with the Judgment's affirmative provisions and to explain Respondent's backpay computation. (Exhibit J at 4). There is nothing unspecific about these requests.

Respondent also objects to the subpoena on the grounds that it is "an oppressive and harassing tactic of the General Counsel." (Resp. at 6-7).[3] To support this contention, Respondent asserts that the Board is already in possession of the documents and information subject to its subpoena. *Id.*[4] As explained below, Respondent's assertion leaves out critical details.

First, the subpoena seeks *all* hiring hall referral records for the period covering September 2010 to September 2013. (Exhibit J at 3). Respondent's correspondence to the NLRB dated December 30, 2015 (Exhibit E at 1), provided the hiring hall records of just 7 individuals

[3] Respondent asserts that certain documents and information responsive to the subpoena is privileged. (Resp. at 5). Pursuant to paragraph 4 of the subpoena's Instructions and Definitions, any claims of privilege can be resolved if Respondent submits a privilege log at the time of production. (Exhibit J at 1, p. 4). *See, e.g.*, *Centurion Indus., Inc., v. Warren Streurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981) (party seeking to withhold documents as privileged bears burden of showing privilege exists); *U.S. v. Int'l Bus. Machs. Corp.*, 81 F.R.D. 628, 630 (S.D.N.Y. 1979) ("blanket and generalized" assertions of privilege are insufficient).

[4] At the outset, this argument ignores footnote 2 of the Board's order denying Respondent's petition to revoke the subpoena. That footnote specifically absolves Respondent of the responsibility to provide material it has already disclosed provided that Respondent "accurately describes which documents under subpoena it has already provided, states whether those previously-supplied documents constitute all of the requested documents, and provides all of the information that was subpoenaed." (Exhibit N, n. 2).

selected by Respondent. The NLRB has no basis for concluding that these limited records and other documents sent by Respondent actually provide an accurate picture of Respondent's backpay obligations under the Judgment. Instead of providing "all relevant copies in subsequent developments" (Resp. at 7), Respondent has largely ignored the NLRB's requests for further documentation.

Second, the subpoena requests specific information to enable the NLRB to evaluate whether the check in the amount of $16,879.58 that Respondent tendered to the NLRB is fully responsive to the Judgment. When Respondent tendered the check, it failed to explain how it arrived at this amount or what portions of the check, if any, constituted compensation for adverse tax consequences, benefit fund contributions, or the employer's portion of FICA and Medicare taxes. Weeks later, when pressed, Respondent's counsel spoke with the compliance officer for NLRB Region 14 about the methodology used to compute the backpay amount tendered, but did so orally and too hastily for the compliance officer to make a record. (Exhibit F). Respondent now asks, "Why is [the NLRB] asking again?" (Resp. at 8). The answer is because Respondent's own deliberate conduct prevented the Board from getting an explanation the first time.

Finally, the subpoena seeks documents showing that Respondent has posted copies of the notice required by the Tenth Circuit's Judgment, which enforced the 2014 Board decision. Although Respondent provided the Region with a signed notice, the notice was dated April 23, 2013 and bore a heading referencing the 2013 Board decision, which was vacated and remanded by the Tenth Circuit. This evidence does not demonstrate that Respondent had posted the notice required by the Judgment.[5]

[5] The subpoena also requests evidence showing that Respondent has complied with the other affirmative portions of the Judgment. Notwithstanding the sworn Certification of Compliance submitted by the Respondent, the NLRB has obtained specific evidence contradicting the

E. THE BOARD IS ENTITLED TO COSTS AND ATTORNEYS' FEES

Respondent has interposed no legitimate objection to obedience with the subpoena. Under these circumstances, the Board is entitled to an award of costs and attorneys' fees incurred in initiating and prosecuting this subpoena enforcement action. *See NLRB v. Cable Car Advertisers*, 319 F. Supp. 2d 991, 999-1001 (N.D. Cal. 2004); *NLRB v. Coughlin*, 176 LRRM 3197, 3202 (S.D. Ill. 2005); *NLRB v. AGF Sports, Ltd.*, 146 LRRM 3022, 3024 (E.D.N.Y. 1994); *NLRB v. Baywatch Sec. & Investigations*, No. H-04-220, 2005 WL 1155109, at *3 (S.D. Tex. April 28, 2005).

Respondent argues that "[e]nforcement of the subpoena is under Fed.R.Civ.P. 45" and that Rule 45 has no provision for attorneys' fees. (Resp. at 8). To support this argument, Respondent relies primarily upon *NLRB v. Midwest Heating & Air Conditioning*, 528 F. Supp. 2d 1172, 1178 (D. Kan. 2007), *objections overruled*, 251 F.R.D. 622 (D. Kan. 2008). However, the court denied the Board's request for attorney's fees in *Midwest Heating & Air* because the subpoenaed entities were not parties to the underlying unfair labor practice decision. *Id.* at 1180-81. In that context, the court concluded that Rule 45, which "contains no express provision for awarding attorneys' fees," was more analogous than Rule 37, which does. *Id.* at 1181. Here by contrast, the subpoenaed entity is a party to the underlying unfair labor practice case. Thus, the distinction set forth in *Midwest Heating & Air* does not apply, and the Board's request for attorneys' fees here is proper.

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representations made in the Certification. Therefore, the subpoena's request for documents supporting Respondent's Certification cannot be legitimately characterized as "oppressive and harassing." (Resp. at 7).

CONCLUSION

For the foregoing reasons, as well as those set forth in its Application and Memorandum, the Board respectfully requests that the Court enforce its subpoena in full and award the Board its costs and applicable attorneys' fees.

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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Dated: November 2, 2016
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CERTIFICATE OF SERVICE

I hereby certify that the Board's attached Reply to Respondent's Response to the Board's Application for an Order Requiring Compliance with Investigative Subpoena was served via electronic notice by the CM/ECF filing system on this 2nd day of November to the below listed party:

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